Supreme Court, U. S.
FILED
JUL 24 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

No. 79-114

ALLAN DORSEY ROGERS, JR.
and
ALLAN DORSEY ROGERS, SR.
Petitioners

vs.

STATE OF MARYLAND
Respondent

PETITION FOR CERTIORARI TO THE COURT OF PPEALS OF MARYLAND

PETITIONERS APPENDIX

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EXHIBIT A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 651

September Term, 1978

ALLAN DORSEY ROGERS SR.
and
ALLAN DORSEY ROGERS JR.

V.

STATE OF MARYLAND

Melvin,
Liss,
Couch,
JJ.

Per Curiam

Filed: February 5, 1979

This appeal arises out of a senseless dispute between husband and wife regarding the custody of their daughter. Appellant Allen Dorsey Rogers, Jr. (hereinafter, Jr.) contends that on January 26, 1977, his wife, Wanda, had "abducted" his minor daughter, Karen. Upon learning that the child was at the home of his father-in-law, he went to the latter's home in order to obtain the return of his daughter. Upon arrival, he knocked at the front door, and when he received no answer, he went around to the rear door. While knocking on the glass window at the back door, he "accidentally" broke the window. Providentially, this permitted Jr. to reach in, unlock the door, enter, and take his daughter, who had been sitting with his sister-in-law at the table. He left a $5 bill on the table and told his sister-in-law that the money was for the repair of the broken window. He then took his daughter to a friend's house for safe-keeping. Jr. thereafter called his father, Allan Dorsey Rogers, Sr. (hereinafter, Sr.) and asked him to come to his apartment so that Jr. could clear out his guns and clothing as he feared the action his father-in-law might take upon learning that he had removed Karen from the father-in-law's house.

St. Bruce McGuire (hereinafter, McGuire) of the Baltimore County Police Department testified that in the early evening of January 26, 1977, he went to Jr.'s home as a result of information he received from the police radio dispatcher that Jr. (who resided at the address given) was wanted for a breaking and entering in

Anne Arundel County; Jr. was not at home at this time. Several hours later (about 9:00p.m.) on that same date, when McGuire received information that Jr. and another man (later discovered to be Sr.) had gone into Jr.'s apartment, McGuire and three other Baltimore County officers met at that address. Two of the officers remained downstairs, and McGuire and Officer Lengel went upstairs to the Rogers apartment. McGuire was armed with a shotgun because an earlier broadcast had indicated that Jr. was armed with a .357 magnum revolver.

Sgt. McGuire rapped on the door of the apartment and Sr. answered. The latter was advised that the police were looking for Jr. on a breaking and entering charge and that they had reason to believe he was in the apartment. Sr. refused permission to enter unless the officers had a search warrant, and a scuffle ensued between him and the two police officers. After warning Sr., the officers arrested him for hindering an officer. McGuire requested the two officers who had remained downstairs to take Sr. to the police station, whereupon Sr. stated that he was going inside to get his coat and the officers were not to follow. McGuire and one of the other officers attempted to detain Sr., and another scuffle ensued. The record gives varying versions as to who struck whom in the scuffle, but it is clear that at this point Jr. appeared from the bedroom of the apartment armed with a revolver which the officers contended was pointed directly at them. Shots were fired, at least one of which came from

the gun held by Jr., and Jr. was struck in the hand by a bullet. The two Rogers were then subdued and arrest. In addition to the injuries suffered by the Rogers, at least two of the officers sustained injuries.

Charges were placed against both appellants, and on January 23, 1978, in the Circuit Court for Baltimore County, after a jury trial, Jr. was convicted of assault with intent to murder, two counts of assault, and the unlawful use of a handgun in the commission of a felony; Sr. was convicted of two counts of assault, resisting arrest, and assault with the intent to prevent a lawful apprehension. After a motion for a new trial was denied, sentences were imposed, and it is from these judgments that both appellants have appealed.

Appellants raise four issues to be decided on appeal:

1. Whether the State suppressed material, exculpatory evidence favorable to the accused resulting in a denial of a fair trial for the appellants as a result of which a new trial should have been granted?

2. Whether the evidence offered by the State was sufficient to convict either or both of the appellants?

3. Whether the trial judge violated the rule in the case of Bruton v. U.S., 391 U.S. 123, in permitting a statement of Rogers, Sr. to be admitted into evidence and commited further error by instructing the jury sua sponte as to the weight to be given to that testimony?

4. Whether the convictions of Rogers, Sr. of assault and assault to prevent the lawful apprehension of another merged?

1.

Appellants argue that the State suppressed material evidence of an exculpatory nature favorable to the accused which prevented a fair trial, and that the trial court should therefore have granted the appellants' motion for a new trial. There is a two pronged test which has been accepted as the standard against which an allegation of State misconduct must be measured: First, the evidence must be material to the innocence or guilt of the accused; second, its suppression must have operated to prejudice the defendant. Brady vs. Maryland, 373 U.S. 83. The Court of Appeals followed these principles in State v. Giles, 239 Md. 458, 469, when it said:

> We think that in order for the nondisclosure of evidence to amount to a denial of due process it must be such as is material and capable of clearing or tending to clear the accused of guilt or of substantially affecting the punishment to be imposed in addition to being such as could reasonably be considered admissible and useful to the defense.

See Tobias vs. State, 37 Md. 605. Deliberate concealment is not required, and the absence of bad faith is irrelevant. Giglio v. U.S. 405 U.S. 150. Nor is the State excused when

the improper nondisclosure is the fault of the police rather than the prosecutors. Barbee v. Warden Maryland Penitentiary, 331 F.2d 842. We note, however, that the State's Attorney operated on an "open file" basis with counsel, and that the information allegedly suppressed was in the possession of the police and was not disclosed to the State's Attorney until after the judgments had been entered against the appellants.

Appellants contend that the evidence improperly suppressed by the State was: 1) a signed statement and offense report of Corporal Robert Hauf of the Baltimore County Police Department, 2) a signed statement of Sgt. Franklin Lengel, and 3) a ballistics report.

Appellants argue that the Hauf statement indicates that after interviewing the estranged wife of Rogers, Jr., Hauf concluded that Jr. was not violent and the problem between Wanda Rogers and her husband was domestic in nature. Appellants contend that if this conclusion had been made known to them, they would have had a defense to the charges - as they could have argued that the entry into the Rogers' home was an unlawful entry which resulted in an illegal arrest. We have carefully considered the statement of Officer Hauf and do not find that it was evidence useful to the defense which was capable of clearing the accused of guilt or of substantially affecting the punishment imposed. Ross v. Warden, 1 Md. App. 46;

Tobias v. State, supra. We note, in addition, that appellants' basis for claiming that the Hauf statement was material, i.e., as proof of right of the appellants to resist unlawful arrest, was not raised at the hearing on the motion for new trial and is raised for the first time on appeal. Maryland Rule 1085. The Court of Appeals held in Rogers v. State, 280 Md. 406, that the common law right to resist an illegal arrest does not extend to arrest upon a warrant issued by a judicial officer. As the officers were armed with such a warrant, Officer Hauf's statement could not have been exculpatory as to the resisting arrest charges in this case and what followed during the altercation.

Appellants contend that the suppression of Sgt. Lengel's statement amounted to a failure to disclose exculpatory evidence. We do not agree. From our reading of the statement, we conclude that, at most, it might have provided a basis for the impeachment of Sgt. Lengel's credibility at trial. In commenting on the exculpatory nature of impeachment evidence, we said in Tobias, supra, at 633:

> What is fairly deducible from the cases is that, with respect to impeachment evidence not deliberately suppressed, the court may examine its overall value to the accused in the light of the other evidence properly admitted against him. If, from the record, the court concludes that the suppressed evidence was not of such importance as likely

> to have changed the result of the proceeding, either by inducing a reasonable doubt as to the defendants guilt or by serving to convince the body responsible for recommending or imposing sentence that a lesser sentence should be imposed the suppression will not suffice to require that the result be nullified.

The trial judge considered the evidence given by Sgt. Lengel in his direct testimony and cross-examination and came to the following conclusion as to the impeachment value of the statement:

> Obviously, to this Court, the testimony of Sergeant Lengel is almost, not word for work, but the testimony which he gave in open court was basically what he said in his report. There is probably some slight differentiation, but that is a normal thing. He testified basically what he knew or what he saw, what he observed. You must keep in mind this case was a mass of confusion brought about by many people but particularly the defendants themselves.

Under the circumstances, we agree with the trial court that the report was not of such relevance and import as would have been likely to create a reasonable doubt as to

the appellants' guilt.

Lastly, the appellants argue that the ballistics report suppressed by the State would have revealed "that the one shot that came from Jr.'s gun could not have been fired at a point in time when the handgun was pointed at or near or in the direction of any or all the police officers." Again, we do not agree. The record clearly indicates that the appellants were aware that the ballistic experts of the Crime Lab. had been at the scene and had removed a .357 Magnum bullet from the ceiling. Trial counsel made no request for any ballistics report and was apparently satisfied with his cross-examination of the various witnesses. The report itself does not substantiate the appellants' contention that it would have been exculpatory in nature. At the most, its value would have been as a means of impeaching the testimony of the police officers. Even if we accept, arguendo, that at the time the gun was fired, its trajectory would indicate that it was not then aimed at any of the officers, the record reveals that during the course of the altercation, Jr. pointed the gun at several of the officers; and that evidence, if believed, was sufficient to sustain the convictions. The ruling of a trial court on a motion for a new trial, even after an allegation of newly discovered evidence, will not be disturbed unless clearly erroneous so as to amount to a clear abuse of discretion. State v. Devers and Webster, 260 Md. 360; Tucker v. State, 244 Md. 488.

The second contention of the appellants goes to the sufficiency of the evidence to convict each of them. From our reading of the record, we have no difficulty in concluding that there was more than sufficient evidence to permit the jury to find the appellants guilty beyond a reasonable doubt. Without repeating the facts earlier recited in this opinion, it is clear that so far as Rogers Sr. was concerned, he was advised that the police officers were at the premises pursuant to an arrest warrant, that he refused them entry, and that he became involved in a struggle with two of the officers during the course of which he attempted to grab the shotgun held by one of them. If believed this evidence was more than enough to sustain a find of guilty on the charges against Rogers, Sr.

With respect to the assault with intent to murder conviction of Jr. (the sufficiency of the evidence being the only charge challenged by him in this appeal), there was evidence to establish an intention by Jr. to inflict grievous bodily harm on one or more of the officers involved in the altercation. From the evidence, the jury could and did find an intent to murder beyond a reasonable doubt. Byrd v. State, 231 Md. 432; Beall v. State, 203 Md. 308; Smith v. State, 6 Md. App. 114; Johnson v. State, 2 Md. App. 235; Culver v. State, 1 Md. App. 406.

Appellant Rogers, Jr. next complains about testimony offered at trial regarding an alleged

incriminating statement made by Sr. at a hearing in the District Commissioner's office. One of the officers testifed that after receiving his Miranda rights, Sr. broke down, started to cry, and made the following statement:

> My son broke into a house in Anne Arundel County and taken (sic) his child. We don't know where the child is now. He wouldn't say. When the police came I asked them if they had a search warrant or an arrest warrant because I knew my son, what his temper was, and I know he had a gun in the room and with his temper, I knew what he was going to do. I didn't want this to happen, but with his temper I knew it was going to happen.

Appellants had the substance of this testimony prior to trial as the statement was included in the police reports furnished to appellants' counsel. The officer was listed as witness for the State. The defense made no motion in limine, nor did it raise any question as to the admissibility of Sr.'s statement in the joint trial of the appellants. The officer's testimony about the statement came in without objection from the defense. No motion for a mistrial or for instructions to the jury regarding the admission of the statement was made by the defense. Immediately after the witness's testimony had been concluded and after the denial of the defense's motion for acquittal, the trial judge sua sponte told the jury:

> Mr. Foreman and ladies and gentlemen of the jury, the last testimony that you heard, the testimony of Officer Tenney, he testified as to what he heard at the bail hearing by the Commissioner at the District Court level. That testimony only pertains to Rogers, Sr. The testimony which he explained to you was directed to Rogers, Sr. as to what he said, his reaction at that level.

No objection was made to this instruction to the jury and, again, no motion for a mistrial was offered. Appellant Jr. suggests that these circumstances are sufficient to bring the case sub judice within the holding of the Supreme Court in Bruton v. U.S., supra. In that case, the Court held that even in an instance in which the trial judge had warned the jury that a confession made outside of court by one defendant may not be considered as evidence against the other defendant who is not present and who is in no way a party to the confession, that there is still a substantial risk that the jury, despite instructions, would look to the incriminating extrajudical statement in determining the absent defendant's guilt. Appellant urges that Bruton and the case at bar are similar.

We conclude that Bruton is distinguishable from the case we here consider. Initially, it is evident that the issue has not been preserved for appellate review. No objection, motion to strike, or motion for mistrial was made by the appellants or their counsel either

during the officer's testimony or during the instructions to the jury. These failures amounted to a waiver of appellants' right to raise the contentions of error on appeal. Rule 1085. In addition, the Maryland courts have construed Bruton to mean that the exclusionary rule as to extrajudicial confessions does not apply where the confession co-defendant takes the stand and the remaining defendant's right to confrontation is satisfied by the right of cross-examination. In Re Appeal No. 977, 22 Md. App. 517; Adam and Green v. State, 14 Md. App. 135. As we find Bruton not to be applicable, then the appellant's complaint as to the jury instruction is also inapplicable in this case. While we recognize our right to take notice of plain error in jury instructions which are material to the rights of the defendant, in this instance, we conclude that Rogers, Jr. was the beneficiary of a cautionary instruction to which he was not entitled. Rule 757 (h) and predecessor Rule 756 (g). Appellants, in their reply brief, in support of their suggestion that this is an appropriate case for us sua sponte to excuse the waiver of this issue for appellate review cite Wolfe v. Sate, 218 Md. 449. That case is completely inopposit. In Wolfe, it was the trial judge, sua sponte, who gave prejudicial instructions to the jury, incorrectly quoted the law, and erroneously advised the defendant of his rights during a jury trial. What was controlling, however, was that the defendant was not represented by counsel and was completely unaware of his right to object to the remarks of the

trial judge. In not the slightest degree can Wolfe be equated with the case at bar.

Appellants further argue in their reply brief that the error in the admission of the statement could not have been corrected because counsel represented both defendants and could not, therefore, have ethically or effectively cross-examined Rogers, Sr. We do not accept this version of the matter. Sr.'s statement amounted to an exculpatory statement so far as he was concerned. In an effort to save one of the defendants, it may well have been good trial tactics to permit the statment to come in. What lends credence to this view is the fact that counsel at trial for these defendants is experienced and capable and undoubtedly is aware of the implications of Bruton, supra. Under these circumstances, the failure to object to the admission of Rogers, Sr.'s statement was in our opinion a deliberate vaiver of the right to object.

4.

Appellant Rogers, Sr. argues that his conviction for assault on Sgt. McGuire should merge with the conviction for assault with intent to prevent the lawful apprehension of another. There are several reasons why we decline to consider this contention, the first being that no such issue was raised below and it cannot be raised for the first time on appeal. In addition, the sentences imposed were concurrent. We have held in a number of cases that we will apply Rule 1085 in those cases where the merger issue was not

raised or decided in the trial court and where the sentences imposed were concurrent. See e.g., Colbert v. State, 18 Md. App. 632; Moore v. State, 15 Md. App. 396; Alston vs. State, 11 Md. App. 624.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANTS

ALLAN DORSEY ROGERS, JR. and ALLAN DORSEY ROGERS, SR.

v.

STATE OF MARYLAND

In the
Court of Appeals
of Maryland

Petition Docket No. 28
September Term, 1979
(No. 651, September Term, 1978
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Marvin H. Smith
Senior ~~Clerk~~ Judge

Date: April 26, 1979.